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No. 82-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's arguments in support of her construction of the Rehabilitation Act of 1973, as amended, rely on a fundamental misconception: In the absence of federal intervention into the work place on behalf of handicapped persons, employers such as Conrail "would be free to refuse to hire an attorney because he or she had a bad back, to pay a ticket clerk less because he or she used a cane, or to fire a baggage handler because he or she used a hearing aid." Respondent's Brief (hereinafter R. ——) at 40-41. *See also*, R. 84. Respondent's asser-

tion ignores the existence of state laws in the vast majority of the states prohibiting employment discrimination on the basis of handicap (see Appendix A to this Brief). Statutes prohibiting such discrimination are in force in Pennsylvania, Conrail's principal place of business, and in every other state in which Conrail does business except Delaware. The issue in this litigation is not whether handicapped individuals will be left wthout a remedy; rather, it is whether Congress intended to use the receipt of federal assistance as the basis for intervening in work place employment decisions irrespective of the underlying purpose of the federal program or assistance.

Contrary to the arguments of Respondent and the supporting amici, Congress never envisioned such a far-ranging remedial scheme. The 1973 Act was directed principally at the creation and maintenance of vocational programs for the handicapped, not employment discrimination. During the period between 1973 and 1978, Congress gradually recognized that specific enforcement provisions were needed to support the objectives of Section 504. Congressional efforts to provide for such enforcement culminated in the 1978 Amendments to the Rehabilitation Act, which incorporate into Section 504 all of the remedies, rights and procedures of Title VI of the Civil Rights Act of 1964. Because Section 504 was intended to prevent discrimination in connection with specific programs, the limitation in Section 604 of Title VI with respect to employment practices also applies to Section 504. Such an interpretation would simply limit federal intervention in the work place to those situations where the primary objective of the federal assistance is to provide employment—a result that is compatible with the purposes of the specific programs providing federal assistance.

Petitioner argued in its initial brief that there is no private cause of action under Section 504. With *Guard-*

ians Ass'n v. Civil Service Commission of the City of New York, 103 S.Ct. 3221 (1983), a majority of the Court has since then recognized a private right of action under Title VI. In light of Section 505(a)(2), which incorporates the "remedies, rights and procedures" of Title VI into Section 504, Conrail no longer argues that Section 504 cannot be enforced through a private action. Nonetheless, Conrail maintains that a monetary remedy is unavailable in a private action under Section 504, and consequently, this case is moot.

I. The Plain Language Of The Rehabilitation Act Contains An Express Limitation On Employment Discrimination Actions

Respondent and amici construe the "remedies, rights and procedures" of Title VI incorporated into Section 504 to exclude Section 604 because the latter provision is a "restriction" or "limitation", rather than a "remedy", "right" or "procedure". R. at 81-82; U.S. Brief (hereinafter U.S. ——) at 23.[1] Respondent and amici further assert that Congress intended Section 505(a)(2) to make available only the procedural, rather than the substantive, provisions of the Title VI regulations for Section 504 complaints. (R. 87-89); (U.S. 24-25); (AFSCME 12-13, 15-16).

To argue that "Sec. 604 pertains not to rights, but to limitations on rights, is a distinction without meaning." *Sabol v. Board of Education*, 510 F. Supp. 892, 897-98 (D. N.J. 1981). The "remedies, rights and procedures" in Title VI, do not exist apart from their limitations and cannot be incorporated into the Rehabilitation Act without them. Obviously, Congress could have incorporated Title VI without Section 604, but it did not do so. Congress

[1] The amicus brief of the American Federation of State, County and Municipal Employees, *et al.*, shall be referred to as (AFSCME ——); the amicus brief of Senator Alan Cranston, *et al.*, shall be referred to as (Cranston ——).

could also have incorporated solely the "procedures" of Title VI, but it did not do so. As noted by the Court, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974).

Moreover, both the Department of Health and Human Services ("HHS") and the Department of Justice ("DOJ") have acknowledged that certain substantive limitations contained in Title VI apply to Section 504. In the HHS Section 504 Guidelines, the agency determined that Section 504 would not cover contracts of guaranty and insurance, based on an interpretation provided by the DOJ, 43 Fed. Reg. 2132 (Jan. 13, 1978).[2] Under this interpretation, the DOJ reasoned that, because Congress intended to apply the exclusion of such contracts under Section 602 of Title VI to Section 601, the same analysis should be utilized for the similarly worded Section 604. Both Sections 602 and 604 of Title VI operate to exclude certain recipients of federal funds from the scope of Title VI and both are addressed specifically to agencies. Nonetheless, the HHS and DOJ have considered one of these provisions, Section 602, to be applicable to Section 504.

Respondent also argues that Section 505(a)(2) is not a mandatory provision, but that it merely supplements certain unidentified pre-existing remedies (R. 82-83). In conjunction with this argument, Respondent contends that Section 604 cannot limit individual Section 504 ac-

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[2] The DOJ interpretation is set forth in a letter, dated September 23, 1977, from John M. Harmon, Assistant Attorney General, to F. Peter Libassi, General Counsel for the HEW, which is reprinted in *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. On Select Education of the Comm. on Education and Labor of the House of Representatives*, 95th Cong., 1st Sess. 353, 355-56 (1977) ("1977 House Hearings").

tions, because Section 604 only applies to departments or agencies, and that Section 604 cannot limit agency Section 504 actions, because Section 505(a)(2) only refers to "persons" (R. 83-84).

The limitations of language permit artful constructions that cannot withstand close scrutiny. Respondent's interpretation of Sections 505 and 604 fall into that category. If Section 604 of Title VI applies only to agencies, then private plaintiffs under Title VI could challenge personnel decisions that are neither regulated nor reviewed by the agencies charged with the administration of the statute. It is not surprising that this bizarre construction is offered without the citation of supporting authority and is disavowed by the Government.[3] Similarly, to argue that Section 604 is inapplicable to federal agencies because of its reference to "person aggrieved" is to ignore the fact that Title VI's enforcement scheme is administrative in character and requires that the rights, remedies and procedures provided by the agency be coextensive with those accorded the person aggrieved. Did Congress intend for the agencies to regulate a personnel decision about which the person aggrieved could not complain?

Under Respondent's interpretation, Congress, by enacting Section 505(a)(2) in 1978, gave handicapped employees virtually nothing. The allegedly pre-existing rights and remedies under Section 504 makes Section 505(a)(2) redundant. Indeed, although Title VI was the model upon which Section 504 was based, and Sec-

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[3] In its brief, the DOJ noted "serious doubt that such an interpretation is consistent with the purpose of Section 604," (U.S. 23 n.27). *See* Petitioner's Brief at 11-14. The only judicial decisions that have considered this issue have held that individual complaints under Title VI are limited by Section 604. *United States v. Jefferson Cty Bd. of Educ.*, 372 F.2d 836, 883 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967); *Feliciano v. Romney*, 363 F. Supp. 656 (S.D.N.Y. 1973).

tion 505(a)(2) expressly adopted the remedies, rights and procedures of Title VI for Section 504, Respondent asserts that the rights of individuals and agencies under Section 504 are far broader than those accorded under Title VI. Why, then, did Congress enact Section 505?

"In construing a statute, we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), *quoting United States v. Menasche*, 348 U.S. 528, 538-39 (1955). This Court should not ignore Congress' express incorporation of all "remedies, rights and procedures of Title VI" into Section 504, as suggested by Respondent. Nor should this Court construe Congressional intent to accord a meaningless and superfluous remedy in the Rehabilitation Act amendments of 1978. For these reasons, based upon the plain language of the Rehabilitation Act and Title VI, Respondent should not be permitted to maintain a cause of action for employment discrimination without showing that the primary objective of the Federal financial assistance given to Conrail is to provide employment.

II. Congress Did Not Intend To Provide A Broad Cause Of Action Against All Employment Discrimination In Enacting The Rehabilitation Act of 1973

Respondent and amici repeatedly stress the overall goals of the Rehabilitation Act and isolated comments of members of Congress in asserting that Congress enacted the Act to address its primary concern with the problem of employment discrimination. (R. 61-72); (U.S. 13-14, 16-18); (AFSCME 7-10); (Cranston 4-6). If such were the case, Congress selected an exceedingly indirect way of accomplishing this goal.

At the time of the enactment of Section 504, Congress recognized that Section 504, "proclaim[ed] a policy of nondiscrimination. . . ." S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News

2076, 2123. The legislative history of the provision offers virtually no guidance as to whether Section 504 was considered a mandatory provision.[4] *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1285 n.26 (7th Cir. 1977). Indeed, even the HHS recognized that "there is almost no substantive legislative history surrounding the development and enactment of Section 504. There were, for example, no public hearings accompanying the original bills and there was almost no substantive floor debate." 41 Fed. Reg. 20296 (May 17, 1976).

Respondent points to a number of comments by sponsors of the Act which she asserts demonstrate a Congressional understanding that all employment discrimination would be covered by Section 504. The majority of these statements, however, refer to Sections 501 and 503 of the Act, which specifically deal with employment discrimination. The statements concerning "unfounded discrimination in employment" by Senators Cranston and Stafford, 119 Cong. Rec. 5882-83, 5893, relate, upon closer examination, to Sections 503 and 501, respectively.[5] Similarly, Senator Cranston frequently referred to "discrimination in federal employment and under federal grants." 118 Cong. Rec. 32280, 58626; 119 Cong. Rec. 24569. Other remarks concerning the need for vo-

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[4] Congress may have intended Section 504 to reflect existing law under the Fourteenth Amendment, as enforced by 42 U.S.C. § 1983. As of 1973, several courts had utilized equal protection principles to require an appropriate education for handicapped children, *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), and adequate education and care for the mentally retarded, *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, remanded in part*, 503 F.2d 1305 (5th Cir. 1974).

[5] In his remarks, Senator Cranston noted the requirement for an "affirmative action program to ensure that they have the right to employment. . . ." 119 Cong. Rec. 5883, which could only refer to Section 503, not Section 504. Senator Stafford's comments related to the Federal Interagency Committee on Employment established under Section 501, 119 Cong. Rec. 5893.

cational rehabilitation, 118 Cong. Rec. 30680 (Sen. Randolph); 119 Cong. Rec. 24587 (Sen. Taft), are hardly surprising in light of the primary purpose of the Act, which had been entitled previously "the Vocational Rehabilitation Act." S. Rep. No. 318, 93d Cong., 1st Sess. n.8, *reprinted in* 1973 U.S. Code Cong. & Ad. News at 2082-83.[6]

The legislative history of the 1973 Act contains no mention of a Congressional purpose to provide a far-ranging remedy against all employment discrimination.[7] Congress did not supplement Section 504 with any enforcement provisions, as it had with Title IX of the Education Amendments of 1972, and with Title VI.[8] Coupled with the lack of debate and the placement of Section 504 within the "Miscellaneous Provisions" title of the Act, the 1973 Act could hardly be said to be directed primarily at providing a remedy against employment discrimination. Congress' alleged overriding concern with such discrimination is further belied by its repeated failure, despite numerous opportunities, to amend Title VII to include handicap discrimination. *See* Appendix A to the amicus brief for the Equal Employment Advisory Council. For these reasons, it is clear that Congress did not consider Section 504 to be the

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[6] This focus upon vocational rehabilitation also explains the original definition of "handicapped individual" which was set forth in terms of employability (R. 60-61); (U.S. 13).

[7] Senator Williams' statement concerning "prohibitions against discrimination in employment in programs assisted with federal funds," 119 Cong. Rec. 24588, exidently combined the provisions of Sections 503 and 504.

[8] The Court in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), refused to apply Section 604 to Title IX, for that was the only provision that had no Title IX counterpart. With respect to Section 504, however, "[b]ecause no enforcement provisions were included in the 1973 Act, no express exemption was included either." 1977 House Hearings at 355-56.

employment discrimination panacea that Respondent and amici contend.

III. Congress Clarified The Scope Of Section 504 In The 1974 And 1978 Amendments To The Rehabilitation Act

Subsequent to the enactment of the Rehabilitation Act, Congress quickly recognized that additional legislative guidance was needed with respect to the scope of Section 504. As noted by Respondent, the definition of "handicapped individual" was amended in 1974 to apply outside of the employment context (R. 72-73). The Senate Report accompanying this amendment explained the rationale for this modification:

> *Section 504 was enacted to prevent discrimination* against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, *in relation to federal assistance in employment, housing, transportation, education, health services or any other federally aided programs.*

S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388 (emphasis supplied). The Report reflects Congressional recognition that Section 504 was intended to prevent discrimination in the context of specific federal aid programs, consistent with the operation of Title VI. Thus, federal funds given to provide employment could not be utilized to deny employment to handicapped individuals, just as federal housing funds could not be utilized to deny housing to these individuals.[9]

To fill the legislative gap in the enforcement of Section 504, Senate Report No. 1297 also called for a compliance program to be devised by administrative regula-

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[9] By enacting this amendment, Congress intended to parallel existing judicial interpretation of Title VI coverage for complaints under both Sections 503 and 504. S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6389.

tion. *Id.* 1974 U.S. Code Cong. & Ad. News at 6390-91. Congress did not provide specific guidance, however, as to the scope of administrative enforcement of Section 504. As a result, HEW acknowledged that ". . . the very general language of the statute creates serious problems of interpretation . . . the statute is ambiguous as to the specific scope of [individual] rights". 41 Fed. Reg. 20296 (May 17, 1976).[10]

HEW issued final regulations governing the implementation of Section 504 in 1977, 42 Fed. Reg. 22676 (May 4, 1977), only after an Executive Order was issued directing HEW and other federal agencies and departments to issue such regulations, 41 Fed. Reg. 17871 (April 28, 1976). In the interim, Congress took no action to demonstrate its intent with regard to Section 504. Indeed, Section 504 was conspiciously absent from the list of statutes for which attorneys' fees were provided under the Civil Rights Attorneys' Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988, which included Title VI and Title IX. *See* S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908; H. Rep. No. 1588, 94th Cong., 2d Sess.[11]

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[10] Respondent asserts that regulations issued by HEW in 1974 were considered by Congress to be "reflective of underlying Congressional intent." (R. 74). These regulations, however, made no specific mention of Section 504, and certainly did not provide for any compliance program. 31 Fed. Reg. 18562, 18582 (May 28, 1974). In fact, HEW's policies were in flux between 1974 and 1977, as is evidenced by the issuance of proposed regulations in 1975 which expressly declined to establish an individual complaint procedure. 40 Fed. Reg. 24148 (June 4, 1975). These proposals were withdrawn one year later. 41 Fed. Reg. 18394 (May 3, 1976).

[11] Respondent and amici point to Senate Conference reports with respect to the Education for All Handicapped Children Act of 1975 and the Education Amendments of 1974 as evidence that Congress understood Section 504 to provide a remedy against employment discrimination by all federal grantees. (R. 76-77 n.56); (U.S. 20 n.24); (AFSCME 9-10 n.3); (Cranston 7-8 n.6). These reports suggested that certain proposals were deleted as unneces-

In 1978, Congress finally provided explicit statutory remedies for Section 504, by incorporating into Section 504 the "remedies, rights and procedures" of Title VI. Contrary to the assertions of Respondent and amici, (R. 92-93); (U.S. 25); (AFSCME 14); (Cranston 9-10), Petitioner does not contend that Congress restricted the remedies available under Section 504 by means of the 1978 Amendments. As shown above and in Petitioner's principal brief, however, Congress did not specifically provide *any* remedies until 1978. Thus, rather than limiting remedies, the 1978 Amendments clarified Congressional intent to provide the "remedies, rights and procedures" of Title VI to enforce Section 504.

The Congressional debates concerning Section 505 contain no mention of any intent to apply Section 504 as a general employment discrimination statute. Senator Javits noted, for example, that "Section 118 amends Title V of the act to provide that the remedies, procedures and rights in the Civil Rights Act of 1964 shall be available with respect to complaints under Sections 501 and 504 of the Rehabilitation Act (Section 501 concerns employment and Section 504 concerns federally assisted programs)." 124 Cong. Rec. 30315. Although Section 504 covered employment programs, the main thrust of the employment discrimination provisions continued to lie in Sections 501 and 503.[12]

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sary due to the existence of Section 504. Because these statutes do not mention Section 504, such statements merely constitute what the Committee believed Section 504 to mean, which is entitled to little weight. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

[12] Respondent refers to the 1978 amendment to limit coverage of alcoholics and drug abusers under Section 504 as evidence of the broad scope of that section (R. 90). This amendment, which modified the definition of "handicapped individual", only limited a remedy that Congress already understood was available to address employment discrimination under some circumstances. It should also be noted that this amendment was offered in response to agency

Respondent and amici argue that Senator Cranston objected to a proposed amendment of Section 505(a)(1) which would have limited an action brought against the federal government to equitable and affirmative action remedies in proportion to actual damages, on the grounds that it would create a lesser obligation for the federal government than for federal contractors and grantees. 124 Cong. Rec. 30577-78; (R. 91-92); (AFSCME 10); (Cranston 10 n.11). Congress apparently did not find Senator Cranston's concern compelling or even pertinent, for Section 505 now contains a limitation upon remedies only under Section 501. Indeed, in light of the Court's holding that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds," *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979), Senator Cranston's statement was clearly in error.

Although HEW regulations on Section 504 had been issued prior to the enactment of the 1978 Amendments, the applicability of these regulations to employment discrimination regardless of the purpose of the federal funds was not discussed in Congress. Thus, while the administrative procedure under Section 504 did conform with those promulgated under Title VI, as noted by Senate Report No. 890, 95th Cong., 2d Sess. 19 (1978), there can be no question that the "rights" and "remedies" of the two sets of regulations contained a crucial distinction: to maintain an employment discrimination action, Title VI regulations required that the primary objective of the federal funding be to provide employment, while Section 504 regulations did not contain this limitation. Nothing in the legislative history indicates

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regulations and rulings under Section 503 that required federal *contractors* to hire such individuals. 124 Cong. Rec. 30822 (1978) (Sen. Cannon).

that this specific distinction was brought to the attention of Congress, nor does the legislative history support Respondent's contention that Congress intended to delete a single provision, Section 604, from the remedies, rights and procedures of Title VI incorporated into Section 504.

Respondent's principal argument appears to be that Congress could not have intended to permit employment discrimination "save in one small category of cases" (R. 41). Such a characterization misperceives the issue presented herein, which is the scope Congress intended to give Section 504 in the context of specific federal programs. Congress simply chose not to legislate with regard to the broad range of employment discrimination against the handicapped, as is evident from its refusal to amend Title VII. Respondent's assertions about the need for comprehensive statutory protection for the handicapped "is an argument to be addressed to Congress, not to this Court." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). In ignoring the language of the statute, the court below substituted its policy judgment for that of Congress. Accordingly, Petitioner respectfully submits that the decision below should be reversed.

IV. The Court Below Failed To Find That Any Alleged Discrimination Occurred "Under A Program Or Activity Receiving Federal Financial Assistance"

As discussed in Petitioner's principal brief, Section 504 prohibits discriminatory practices only with respect to a particular federally funded program. *North Haven Bd. of Educ. v. Bell*, 456 U.S. at 536-39. To fall within the protection of Section 504, Respondent must demonstrate a nexus between his denial of employment and a specific Conrail program supported by Federal financial assistance. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235-37 (7th Cir. 1980). Because the Third Circuit rendered no findings with respect to this issue, the

decision of the court below should be remanded for further consideration.[13]

Respondent essentially argues that this Court should adopt an "institutional" approach to Section 504, *i.e.*, if the federal funding *could* be used to support activities which do not fall within a specific federal program, or if the federal funding releases other funds that could be used in support of any activity of the recipient, then discriminatory employment practices for which such funds might be applied fall within the coverage of Section 504 (R. 102-109). This interpretation is identical to the approach adopted by the Third Circuit in *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983), that the receipt of non-restricted federal funds subjects a recipient to the dictates of Section 504 with respect to all of its operations.[14] As noted in Petitioner's principal brief, every court of appeals that has considered this issue, and the DOJ, have rejected this reasoning. *See* Petitioner's Brief at 29.

The district court in this case did determine that Respondent was unable to demonstrate any connection between any alleged discrimination against him and Conrail's receipt of federal funding pursuant to Title V of the Regional Rail Reorganization Act of 1973 ("3R Act"), 45 U.S.C. §§ 771-780 (Petitioner's Appendix at 41-45). The district court rendered no express findings

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[13] A remand would only be necessary should this Court find that the litigation is not moot and that an action may be maintained under Section 504 without a showing that the primary objective of the Federal financial assistance is to provide employment.

[14] Respondent's argument that Conrail is subject to Section 504 under DOT regulations which refer to the use of funds to acquire or improve property or the application of funds to a "facility" (R. 105-107) also reflects an institutional approach. Under this theory, Conrail in its entirety would be subject to Section 504 despite the lack of any connection between, as an example, the employment of engineers and the improvement of road bed.

with regard to a nexus between the denial of employment to LeStrange and Conrail's receipt of non-restricted federal financial support in the form of debentures and Series A Preferred Stock under Section 216 of the 3R Act, 45 U.S.C. § 726. The Third Circuit did not discuss this issue. For these reasons, if it is necessary to resolve this issue the action should be remanded for further proceedings to determine whether Respondent has demonstrated the requisite nexus.

V. A Private Action Under Section 504 Should Not Permit A Monetary Remedy

Respondent and the United States apparently concede that Thomas LeStrange's death precludes an injunctive remedy, and that this action is moot unless monetary relief is available in a private action to enforce Section 504. (R. 16-39); (U.S. 26). In *Guardians, supra*, the majority held only that monetary relief is not available in a private action under Title VI in the absence of proof of intentional discrimination. The Court did not resolve the converse question. Here, Respondent seeks monetary relief of back pay and medical expenses, and the Complaint asserts intentional discrimination on the basis of handicap. J.App. A-7, A-8. Thus, the question presented under Section 504 is one not resolved under Title VI by the *Guardians* decision: whether, assuming that intentional discrimination can be shown, a private plaintiff in an action to enforce Section 504 may recover a monetary remedy? [15]

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[15] The opinions in *Guardians* concerning the relief available under Title VI and the relation to intent may be influenced by the fact that plaintiffs in that case also presented a claim under 42 U.S.C. § 1983. *See* Powell, J., concurring opinion, 103 S.Ct. at 3221; Stevens, J., dissenting opinion, 103 S.Ct. at 3221; White, J., separate opinion, 103 S.Ct. at 3228, n.17, 3232, n.32. It is noteworthy that in the majority of decisions finding a right to monetary relief under Section 504, there have been available alternative statutory bases for recovery under Section 1983 or other provisions. *See Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982); *Gregg v. Board of*

Conrail maintains that monetary relief should not be permitted in a private action under Section 504, and that the relief available should not be determined by the proof of discrimination presented. Justice White's opinion in *Guardians* suggests that in cases of intentional discrimination under Title VI, compensatory awards may be appropriate because "there can be no question as to what recipient's obligation under the program was and no question that the recipient was aware of that obligation." 103 S.Ct. at 3230.

While such certainty may be present in cases of racial discrimination in violation of Title VI, the question of whether handicap discrimination has occurred is usually less well-defined. Unlike blacks and other racial minorities, handicapped individuals form a composite, not a discrete group, which is often difficult to define under the vague definition of Section 7(7)(B). *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Cf. E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Hawaii 1980). Further, whether an employment action is discriminatory may depend upon the reasonableness of any necessary accommodations in the work place. *Southeastern Community College v. Davis*, 442 U.S. at 412-13.

There is no basis in the language of Section 504 or its legislative history for treating intent as a determinative factor concerning the availability of damages. To Conrail's knowledge, none of the lower courts which have examined the issue of monetary relief under Section 504 prior to *Guardians* have focused on the intentionality criterion.[16] Even if the Court concludes that intent de-

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Education, 535 F.Supp. 1333 (E.D.N.Y. 1982); *Hutchings v. Erie City & Cty Bd. of Dir.*, 516 F.Supp. 1265 (W.D. Pa. 1981); *Poole v. South Plainfield Bd. of Educ.*, 490 F.Supp. 948 (D.N.J. 1980). In this case the *only* basis for recovery available to Respondent is Section 504.

[16] In *Marvin H. v. Austin Independent School Dist.*, 714 F.2d 1348 (5th Cir. 1983), the Court concluded that damages are not available under Section 504 in the absence of intentional discrimination.

termines the available remedy for race discrimination under Title VI, such an approach should not be extended unnecessarily and unwisely to the area of handicap discrimination under Section 504.

Respondent argues that back pay and compensatory damages should be available to private litigants under Section 504 because back pay is a traditional equitable remedy and damages effectively induce compliance. (R. 17, 27). Yet such arguments neglect the determinative factor in deciding the available remedies to enforce a statutory right—legislative intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Conrail submits that the evidence of legislative intent strongly suggests the contrary conclusion, that Congress did not intend for monetary relief to be recovered under Section 504.

In legislation concerning handicap discrimination, Congress has carefully circumscribed available remedies. Respondent argues for remedies analogous to Title VII. (R. 22, 27). But there is no dispute that Congress has repeatedly and unequivocally rejected attempts to include handicapped individuals within the protections of Title VII, as the United States acknowledges in its amicus brief. (U.S. 14, n.19). The Cranston amici argue that such amendments were rejected because back pay was already available under the Rehabilitation Act. (Cranston 25). Such an interpretation of Congress' action is incredible given the fact that the first recorded case awarding back pay under Section 504 was decided in 1981, long after the failed attempts to amend Title VII. *See Hutchings v. Erie City & Cty. Library Bd. of Dir.*, 516 F. Supp. 1265 (W.D. Pa. 1981). Further, the 1978 amendments added Section 505(a)(1), which provided federal employees with Title VII remedies in actions under Section 501. Rather than providing Title VII remedies in actions under Section 504, Congress with Section 505(a)(2) incorporated the remedies of Title VI. It can

only be concluded that Congress deliberately chose not to give Title VII remedies to private plaintiffs under Section 504.

Respondent seeks even broader remedies than those provided under Title VII, arguing that compensatory damages should be available in Section 504 actions. (R. 23-39). As the decision in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) illustrates, permitting actions for compensatory damages can expose a federal grantee to liability far beyond that which can be reasonably anticipated from the acceptance of funds or that which is necessary to ensure compliance. In addition, the compensatory damages Respondent argues are available under Section 504 appear to go beyond equitable relief, and therefore, would raise the issue of the right to jury trial. *See Lorillard v. Pons*, 434 U.S. 575 (1978); *Curtis v. Loether*, 415 U.S. 189 (1974); *Doe v. Region 13 Mental Hlth.—Mental Retard. Comm'n*, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983). Most importantly, there is no indication that Congress intended to provide a compensatory damages remedy under Section 504, and none should be implied.

Conrail maintains that absent evidence of Congressional intent to create a private cause of action with a monetary remedy, courts should be exceedingly hesitant to infer such a remedy. This presumption is particularly relevant to legislation enacted under the Spending Clause. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981); *Guardians*, 103 S.Ct. at 3229 (White, J., separate opinion). Recipients of federal funds must be given an opportunity to terminate unanticipated obligations rather than accede to judicially developed compliance requirements. *Id.* Respondent would interpret Section 504 as broad remedial legislation which greatly expands the liability of federal fund recipients for discrimination against handicapped individuals. Conrail submits that there is no evidence that Congress intended that liability, and a statute enacted under the Spending Power should

not be interpreted to have such far-reaching effect in the absence of unequivocal legislative intent. If Congress wishes to enact comprehensive and remedial discrimination legislation for the handicapped, it is free to do so. To date, it has not.

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APPENDIX A

State Laws On
Handicap Discrimination In Employment

Alabama	Alabama Code, § 21-7-8 Applies to public and publicly supported employment.
Alaska remedies:	Commission on Human Relations may seek injunctive relief (§ 18.80.105), cease and desist order, hiring-rehiring, with or without back pay (§ 18.80.130).
Arizona	None (See Executive Order 77-11 (1977) state contractors and subcontractors).
Arkansas	Arkansas Stat. § 82-2901 Applies to public and publicly supported employment.
California remedies:	Cal. Gov't. Code, § 12940 Fair Employment & Housing Commission may seek injunctive relief (§ 12974), cease and desist order, hiring-rehiring, with or without back pay (§ 12970)
Colorado remedies:	Col. Rev. Stat. § 24-34-402 Civil Rights Commission may issue a cease and desist order (§ 24-34-306(9)), order hiring-rehiring, with or without back pay (§ 24-34-405).
Connecticut remedies:	Conn. Gen. Stat. Ann. § 46a-60 Commission on Human Rights may seek injunctive relief (§ 46a-89), cease and desist order, hiring-rehiring, with or without back pay (§ 46a-86).
Delaware	None
District of Columbia remedies:	D.C. Code Ann. § 1-2512 Commission on Human Relations may seek injunctive relief (§ 1-2547), issue cease and desist order, hiring-rehiring, with or without back pay, compensatory damages (§ 1-2553).

Florida remedies:	Fla. Stat. Ann. § 23.167 and § 413.08 Commission on Human Relations may issue cease and desist order and order affirmative relief (§ 23.167(13)).
Georgia remedies:	Ga. Code Ann. § 45-19-20 and § 34-6A-4 Office of Fair Employment Practices may issue cease and desist order, hiring-rehiring, with or without back pay (§ 45-19.38). Civil action for injunctive relief (§ 34-6A-6).
Hawaii remedies:	Hawaii Rev. Stat. § 378-2 Department of Labor and Industrial Relations may seek injunctive relief, cease and desist order, hiring-rehiring, with or without back pay (§ 378-5(c) & (h)).
Idaho	Idaho Code § 56-707 and Executive Order 78-4 Applies to public employment and recipients of state financial assistance.
Illinois remedies:	Ill. Ann. Stat., ch. 68, § 2-102 Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay, damages (ch. 68, § 8-108)
Indiana remedies:	Ind. Code Ann. § 22-9-1-2 Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay (§ 22-9-1-6(K)(1)).
Iowa remedies:	Iowa Code Ann. § 601A.6 Civil Rights Commission may issue cease and desist order, hiring-rehiring, with or without back pay, damages (§ 601A.15(8)).
Kansas remedies:	Kan. Stat. Ann. § 44-1009(a)(1). Civil Rights Commission may issue cease and desist order, hiring-rehiring, with or without back pay (§ 44-1005).
Kentucky remedies:	Ky. Rev. Stat. § 207.150(1) Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay (§ 207.210(3)).

Louisiana remedies:	La. Rev. Stat. Ann. § 2254(c) Civil Action (§ 2256).
Maine remedies:	Me. Rev. Stat. Ann. tit. 5 § 4572 Commission on Human Rights may seek injunctive relief (§ 4612(4)(A) and seek civil action to include cease and desist order, hiring-rehiring, with or without back pay, civil damages (§ 4613(2)(B)).
Maryland remedies:	Md. Code Ann. art. 49B § 16 Commission on Human Relations may seek injunctive relief (art. 49B § 4), cease and desist order, hiring-rehiring, with or without back pay, damages (art. 49B § 11(e)).
Massachusetts remedies:	Mass. Gen. Laws Ann. ch. 149 § 24K & Executive Order No. 143 Fine or not more than $200; non-discrimination also applicable to state employees and in state and state assisted contracts.
Michigan remedies:	Mich. Comp. Laws Ann. § 37.1202 Civil Rights Commission may seek injunctive relief (§ 37.2603), cease and desist order, hiring-rehiring, with or without back pay, damages (§ 37.2605).
Minnesota remedies:	Minn. Stat. Ann. § 363.03(2) Department of Human Relations may seek injunctive relief (§ 363.06 Sub. 4), cease and desist order, hiring-rehiring, with or without back pay, compensatory and punitive damages (§ 363.071 Sub. 2).
Mississippi	Miss. Code Ann. § 43-6-15; § 25-9-103 Applies to public employment.
Missouri remedies:	Mo. Rev. Stat. § 296.020 Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay (§ 296.040(7)).
Montana remedies:	Mont. Code Ann. § 49-2-303 Commission for Human Relations may seek injunctive relief (§ 49-2-503), cease and desist order (§ 49-2-506).

Nebraska remedies:	Neb. Rev. Stat. § 48-1104 Equal Opportunity Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 48-1119(3)).
Nevada remedies:	Nev. Rev. Stat. § 613.330 Equal Rights Commission may seek injunctive relief (§ 233.180) hiring-rehiring, with or without back pay (§ 233.170).
New Hampshire remedies:	N. H. Rev. Stat. Ann. § 354-A:8 Commission for Human Rights may order cease and desist, hiring-rehiring, with or without back pay (§ 354-A:9).
New Jersey remedies:	N. J. Stat. Ann. § 10:5-4.1 Civil Rights Commission may order cease and desist, hiring-rehiring, with or without back pay, damages (§ 10:5-17).
New Mexico remedies:	N. M. Stat. Ann. § 28-1-7 Human Relations Commission may seek injunctive relief (§ 28-1-10(E)) and may order affirmative action (§ 28-1-11(E)).
New York remedies:	N. Y. Exec. Law § 296 Commission on Human Rights may order cease and desist, hiring-rehiring, with or without back pay, compensatory damages (§ 297(4)(c)).
North Carolina	N.C. Gen. Stat. § 168-6 Applies to public and private employees; private cause of action.
North Dakota remedies:	House Bill 1440 effective July 1, 1983 Commission on Human Rights may seek injunctive relief with or without back pay.
Ohio remedies:	Ohio Rev. Code Ann. § 4112.02 Civil Rights Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 4112.05(a)).

Oklahoma remedies:	Okla. Stat. Ann. tit. 25, § 1302 Human Rights Commission may order cease and desist, hiring-rehiring, with or without back pay (25 § 1505(b) & (c)).
Oregon remedies:	Or. Rev. Stat. § 659.425 Commissioner of Bureau of Labor & Industries may order cease and desist (§ 659.060 (3)).
Pennsylvania remedies:	43 Pa. Cons. Stat. Ann. § 955 Human Relations Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 959(F)).
Rhode Island remedies:	R. I. Gen. Laws § 28-5-7 Commission Against Discrimination may order cease and desist, hiring-rehiring, with or without back pay (§ 28-5-24).
South Carolina	Laws of 1983, Ratification No. 209, Senate Bill 394 State Human Affairs Commission enforcement including cease and desist, hiring-rehiring, and back pay and private court actions for civil damages up to $5,000 and attorney's fees and costs.
South Dakota	S.D. Codified Laws Ann. § 3-6A-15 Applies to state employment.
Tennessee remedies:	Tenn. Code Ann. § 8-50-103 Commission for Human Development may seek injunctive relief (§ 4-21-116(c)), cease and desist order, hiring-rehiring, with or without back pay, damages (§ 4-21-118 & 119).
Texas remedies:	House Bill 14-X—effective September 1, 1983 Commission on Human Rights may seek injunctive relief, hiring-rehiring, with or without back pay.
Utah remedies:	Utah Code Ann. § 34-35-6 Industrial Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 34-35-7(12)).

Vermont remedies:	Vt. Stat. Ann. tit. 21, § 495 Aggrieved person or Attorney General may seek injunctive relief, including back pay.
Virginia remedies:	Va. Code § 40.1-28.7 & § 2.1-116.10 Civil Action (§ 40.1-28.7)
Washington remedies:	Wash. Rev. Code § 49.60.180 Board Against Discrimination may issue cease and desist order, hiring-rehiring, with or without back pay (§ 49.60.250).
West Virginia remedies:	W. Va. Code § 5-11-9 Commission on Human Rights may order cease and desist, hiring-rehiring, with or without back pay (§ 5-11-10).
Wisconsin remedies:	Wis. Stat. Ann. § 111.322 Department of Industry may order cease and desist, hiring-rehiring, with or without back pay (§ 111.39(c)).
Wyoming	None